power, that is, define "republican." From the language in the principal case it would seem that the court would support all measures declared by Congress necessary to maintain republican forms of government among the states.[19]

LIABILITY OF MUNICIPAL CORPORATIONS FOR NEGLIGENCE. — Three functions of a municipal corporation can be distinguished: governmental; municipal; and commercial.[1] In exercising the last of these the municipal corporation is clearly as liable for negligence as a private corporation; in the first, where it is performing as agent duties which the state has undertaken, such as preservation of the peace, by almost universal authority it is protected from liability as is the sovereign itself.[2] It is in the case of its municipal functions, consisting of activities carried on primarily for the benefit of the inhabitants of that particular city, that the law is yet chaotic. The correct view, it is submitted, is to impose liability.

Negligent injury may result from the use of property or acts of persons. As to property used for municipal functions, the municipality should be held to the same duty of care as in its private functions. The city has entered into relations which are within the scope of private law, — control and ownership of property, — and it should be subject to the obligations usually attending such relations.[3] It is true that the property is held for a public purpose; but in its municipal functions the corporation is not acting as an agent of the government and hence is not clothed with sovereignty. Why should one injured by a defect in a fire-engine house be differently treated from one injured in a municipal power-house? Justice demands a remedy for each; in each case allowing an action will furnish an incentive to greater efficiency in city administration; and though one activity is technically conducted for profit, both are in fact carried on for the benefit of the inhabitants of the municipality.

The second way in which the municipality might be liable is for the torts of its negligent agents.[4] It has been urged, however, that the doctrine of *respondeat superior* should not apply in the exercise of municipal functions, on the ground that this principle of agency is never properly employed except in business dealings, and the analogy of charitable institutions is suggested. While various reasons for the rule of *respondeat superior* have been given, in last analysis the explanation is ex-

[19] "The issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power." See Pacific States Tel. & Tel. Co. *v.* Oregon, U. S. Sup. Ct., Feb. 19, 1912.

[1] This analysis, which is not clearly recognized by the cases or text-books, has been advocated by Professor Joseph H. Beale.

[2] See DILLON, MUNICIPAL CORPORATIONS, 5 ed., §§ 1666, 1626–1636.

[3] See GOODNOW, MUNICIPAL HOME RULE, cc. 7, 8. The author has suggested applying this principle even to governmental functions, but there is scarcely any authority supporting this view.

[4] No question of agency arises when the city is held for breach of "the duty of occupiers of fixed property to have it in reasonably safe condition." See POLLOCK, TORTS, 8 ed., 74, 75.

pediency; it is socially desirable to hold one who employs and controls another responsible for the torts of that other if in the course of the employment.[5] Profit is immaterial,[6] and the exception of a charitable institution is based on a special ground.[7] Where followed, it has been limited so as to operate only against beneficiaries,[8] it does not apply to religious societies,[9] and the minority decisions refusing to recognize the exception at all are perhaps preferable.[10] The rule of *respondeat superior* would seem, therefore, logically applicable to municipal functions. Its inherent justice [11] is as strong in their case as in that of commercial functions; and no distinction between the two seems possible on the ground of expediency.[12]

The authorities on this subject are conflicting. Municipal corporations are generally held for negligent defects in streets and bridges,[13] but not in New England. *Dyer* v. *City of Danbury*, 81 Atl. 958 (Conn.).[14] The general exemption of quasi-municipal corporations from liability in respect to highways may be explained on the ground that in their case the duty is purely governmental; the state needs roads, and the county is its agent in caring for them. City streets, however, have peculiar and local uses, primarily for the benefit of the inhabitants of the city rather than of the state as a whole.[15] In other municipal functions the liability of the corporation has not been generally recognized. It is submitted, however, that the cause thereof is the failure to make the often difficult yet sound distinction between governmental and municipal functions. The law on this question being still unsettled, it may be hoped that this distinction may ultimately be consistently made.[16]

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[5] See POLLOCK, ESSAYS IN JURISPRUDENCE, 114–131; DICEY, LAW AND PUBLIC OPINION IN ENGLAND, 280, note.

[6] POLLOCK, *id.* 126.

[7] For a discussion of this reason, see 42 CHIC. LEG. N. 122; 22 HARV. L. REV. 228.

[8] Hewett *v.* Woman's Hospital Aid Association, 73 N. H. 556, 64 Atl. 190.

[9] Mulchey *v.* Methodist Religious Society, 125 Mass. 487; Bruce *v.* Central M. E. Church, 147 Mich. 230, 110 N. W. 951.

[10] Kellogg *v.* Church Charities Foundation of Long Island, 128 N. Y. App. Div. 214, 112 N. Y. Supp. 566.

[11] See Professor Wigmore, 7 HARV. L. REV. 405. The present tendency towards Workmen's Compensation Acts shows the conformity of the rule to modern ideas of social justice.

[12] Many cases in apparent conflict with this conclusion are explicable on the ground that the seeming agent is really an officer of the state. See Johnson *v.* City of Somerville, 195 Mass. 370, 377, 81 N. E. 268, 272.

[13] See DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1690. Although generally the city has not ownership of the streets, but an easement and exclusive control, the distinction is but a formal one, and this class of cases can be properly put on the ground of the city's ownership and control of property, the first category suggested.

[14] See DILLON, MUNICIPAL CORPORATIONS, § 1691. The expediency of the majority rule is illustrated by the fact that in New England a liability almost as broad has been imposed by statute. The principal case holds that such a statute does not refer to injuries caused by the falling of a rotten tree-limb. See Hewison *v.* City of New Haven, 34 Conn. 136, 143. *Contra*, Chase *v.* City of Lowell, 151 Mass. 422, 24 N. E. 212. The duty at common law, recognized by the majority rule, seems to include such an injury. McGarren *v.* City of New York, 89 N. Y. App. Div. 500, 85 N. Y. Supp. 861.

[15] See DILLON, MUNICIPAL CORPORATIONS, §§ 1714–1716.

[16] In the following cases the city was held either for negligent defects in its property or for the negligence of its agents: Bowden *v.* Kansas City, 69 Kan. 587, 77 Pac. 573 (fire engine house); City of Lafayette *v.* Allen, 81 Ind. 166 (fire engine); Ching *v.*